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24 NATURAL ALTERNATIVES INTERNATIONAL INC.

25
26 **UNITED STATES DISTRICT COURT**
27 **SOUTHERN DISTRICT OF CALIFORNIA**

28 NATURAL ALTERNATIVES
INTERNATIONAL, INC.,

Plaintiff,

v.

ALLMAX NUTRITION, INC.,
HBS INTERNATIONAL CORP.
and DOES 1-100,

Defendants.

Case No. 3:16-cv-01764-H-AGS

**SECOND AMENDED COMPLAINT
FOR TRADEMARK, COPYRIGHT
AND PATENT INFRINGEMENT
AND CIVIL CONSPIRACY**

DEMAND FOR JURY TRIAL

1 Plaintiff, Natural Alternatives International, Inc. (“NAI”) hereby brings this
 2 Second Amended Complaint against defendants, Allmax Nutrition, Inc. (“Allmax”)
 3 and HBS International Corp. (“HBS”) (collectively “Defendants”), and alleges as
 4 follows:

5 **INTRODUCTION**

6 1. NAI sells its branded CarnoSyn beta-alanine, an amino acid, to customers
 7 throughout the United States and in other countries. NAI’s product is covered by a
 8 robust portfolio of trademark, copyright and patent rights. Allmax and HBS, which
 9 offer to sell and sell dietary supplements containing beta-alanine, has engaged in acts
 10 of trademark, copyright and patent infringement¹, all designed to improperly boost its
 11 sales and intentionally interfere with NAI’s expanding CarnoSyn business. NAI files
 12 this action to stop Defendants from intentionally and willfully infringing upon NAI’s
 13 intellectual property rights and wrongfully interfering with NAI’s CarnoSyn beta-
 14 alanine business. To be clear, NAI’s claims in this case arise from the use by
 15 Defendants, or contract manufacturers acting on their behalf, of beta-alanine that was
 16 not licensed by, or purchased from, NAI or its prior distributor.

17 **PARTIES**

18 2. NAI is a Delaware corporation with its principal place of business in
 19 Carlsbad, California.

20 3. Allmax is a Canadian corporation with its principal place of business
 21 located at 4576 Yonge St., Suite 509, North York, Ontario, Canada.

22 4. HBS is a Canadian corporation with its principal place of business
 23 located at 4576 Yonge St., Suite 509, North York, Ontario, Canada. It also has an
 24 office in Carson City, Nevada.

25
 26 ¹ The Court’s Order entered June 26, 2017 dismissed NAI’s patent infringement
 27 claims based on 35 U.S.C. § 101 and granted NAI leave to file a Second Amended
 28 Complaint on the trademark and civil conspiracy claims. NAI repeats its patent
 infringement claims here to ensure the issue is preserved for appeal.

1 5. The true names and capacities, whether individual, corporate, associate or
 2 otherwise of defendants sued herein as DOES 1-100, inclusive, are unknown to NAI
 3 at the present time and NAI therefore sues such defendants by fictitious names. NAI
 4 will amend this complaint, by leave of Court if necessary, to show such true names
 5 and capacities when the same have been ascertained. Such defendants will include
 6 contract manufacturers and brands that do not buy beta-alanine from NAI and/or
 7 commingle beta-alanine and then use it to manufacture dietary supplements for
 8 brands, offer to sell or sell the finished products to end users, and/or the end users.

9 **JURISDICTION AND VENUE**

10 6. This is an action for trademark infringement under the Lanham Act, 15
 11 U.S.C. §§ 1051, *et seq.*, common law trademark infringement, copyright infringement
 12 under the Copyright Act of 1976, 17 U.S.C. § 101, *et seq.*, and patent infringement
 13 arising under Title 35 of the United States Code, 35 U.S.C. §§ 1, *et seq.*

14 7. Exclusive subject matter jurisdiction over this action is conferred upon
 15 the Court pursuant to 28 U.S.C. §§ 1331 and 1338, 15 U.S.C. § 1121(a), and
 16 supplemental jurisdiction under 28 U.S.C. § 1367. Jurisdiction for NAI's common
 17 law claims also exists under 28 U.S.C. § 1332. Diversity of citizenship exists and the
 18 amount in controversy exceeds \$75,000, exclusive of interest and costs.

19 8. The exercise of jurisdiction over Allmax comports with the laws of the
 20 State of California and the constitutional requirements of due process because Allmax
 21 transacts business and offers to transact business within California. It operates an
 22 interactive website that is accessible by citizens and residents of California. *See* Ex. A
 23 (Allmax Homepage). For example, the website contains a copyright notice for
 24 Allmax. Further, part of its website states: "At ALLMAX Nutrition, we are
 25 committed to protecting your privacy and want you to feel comfortable using our
 26 website. Please take a moment to read this Statement to understand how ALLMAX
 27 Nutrition collects, uses and discloses the personal information you provide to us."
 28 Allmax goes on to say: "If you would like us to update your contact information or

1 remove your name from our mailing list, or if you have any questions or concerns
 2 about ALLMAX Nutrition’s privacy practices or about your personal information,
 3 please contact us at support[at]allmaxnutrition[dot]com.” See
 4 <http://www.allmaxnutrition.com/privacy-policy> (last visited Oct. 18, 2016). The
 5 “terms of use” portion of the website states, in part:

6 By using allmaxnutrition.com you agree to be bound by these terms,
 7 which shall take effect immediately on your first use of
 8 allmaxnutrition.com. If you do not agree to be bound by all of the
 9 following terms please do not access, use and/or contribute to
 10 allmaxnutrition.com.

11 ALLMAX Nutrition may change these terms from time to time and so
 12 you should check these terms regularly. Your continued use of
 13 allmaxnutrition.com will be deemed acceptance of the updated or
 14 amended terms. If you do not agree to the changes, you should cease
 15 using this website.

16 See <http://www.allmaxnutrition.com/terms-of-use> (last visited Oct. 18, 2016). Allmax
 17 also sells and offers to sell its products through retailers located in California,
 18 including without limitation, GNC and Vitamin Shoppe retail stores in the Southern
 19 District of California. See Ex. B (List of American Retailers from Website). Allmax
 20 represents to the public that it creates dietary supplement products offered for sale.
 21 Further, HDS’ contacts with California are properly attributable to Allmax. HDS and
 22 Allmax conduct their business as a single enterprise. They have the same address,
 23 including suite number. Further, Allmax has represented to this Court that it is a party
 24 to CarnoSyn Beta-Alanine License Agreements with NAI, which is located in
 25 California. The documents contain a California choice of forum provision.

26 9. The exercise of jurisdiction over HBS comports with the laws of the State
 27 of California and the constitutional requirements of due process because HBS
 28 transacts business and offers to transact business within California. It is a wholly-

1 owned subsidiary or affiliate of Allmax. HBS distributes Allmax's line of products,
 2 including the products at issue here, in the United States, for purchase at a variety of
 3 retailers in California. Further, HBS has represented to this Court that it is a party to
 4 CarnoSyn Beta-Alanine License Agreements with NAI, which is located in California.
 5 The documents contain a California choice of forum provision.

6 10. Venue is proper in this District under 28 U.S.C. § 1391(b)(2), (3).

7 **FACTS**

8 **A. NAI**

9 11. NAI, a publicly traded company, is a leading formulator, manufacturer,
 10 marketer and supplier of nutritional supplements and provides strategic partnering
 11 services to its customers. NAI offers a wide range of innovative nutritional products
 12 and services to its clients including: scientific research, clinical studies, proprietary
 13 ingredients, customer-specific nutritional product formulation, product testing and
 14 evaluation, marketing management and support, packaging and delivery system
 15 design, regulatory review and international product registration assistance. NAI also
 16 funds, sponsors, directs and participates in research studies to establish consumer
 17 benefits and scientific efficacy supporting both product claims and marketing
 18 initiatives. The comprehensive services NAI offers and financial support for research
 19 have established NAI as an innovator in the field of nutritional science and increased
 20 the goodwill associated with NAI-authorized products.

21 12. NAI owns 46 patents in the United States and foreign countries related to
 22 beta-alanine. Beta-alanine is a non-essential amino acid. In numerous scientific
 23 studies, CarnoSyn beta-alanine, when used as a dietary supplement, has been proven
 24 to delay the onset of fatigue in muscle cells, thereby eliminating muscle fatigue and
 25 soreness and has been shown to improve athletic performance.

26 13. One of the inventors of the patents assigned to NAI, Dr. Roger Harris,
 27 has been recognized for his work in nutritional supplements, particularly his work in
 28

1 several studies using CarnoSyn beta-alanine. He has a lifetime achievement award
2 from the International Society of Sports Nutrition.

3 14. NAI imports and sells beta-alanine to customers in the United States
4 engaged in interstate and foreign commerce. Its beta-alanine is branded and sold
5 under the trademark CarnoSyn, which was first used in commerce in 2004. NAI owns
6 the entire right, title and interest to multiple trademarks, including the CarnoSyn
7 trademark, Serial No. 78372235 and Registration No. 3146289, a true and correct
8 copy of which is attached as Ex. C and incorporated herein by reference, the
9 CarnoSyn Beta Alanine trademark, Serial No. 85606462 and Registration No.
10 4271217, a true and correct copy of which is attached as Ex. D and incorporated
11 herein by reference, and the CarnoSyn Carnosine Synthesizer trademark, Serial No.
12 78372289 and Registration No. 3091092, incorporated herein by reference. NAI also
13 has common law trademark rights, including rights to CarnoSyn, CarnoSyn Beta
14 Alanine, CarnoSyn Carnosine Synthesizer, and Build A Better Muscle, among others.
15 References to “CarnoSyn®” herein are to NAI’s registered and common law
16 trademarks, collectively.

17 15. Prior to April 1, 2015, CarnoSyn® was sold by NAI’s sole authorized
18 distributor, Compound Solutions, Inc. (“CSI”). After that date, NAI began selling
19 CarnoSyn® directly to customers.

20 16. NAI maintains a website to promote and encourage sales of its branded
21 CarnoSyn® beta-alanine at www.carnosyn.com, the content of which is incorporated
22 herein by reference. The contents of the website are protected by copyrights held by
23 NAI and the website includes a copyright notice. A true and correct copy of NAI’s
24 copyright registrations (Nos. TX 8-188-444 and TX 8-187-689) are attached as Exs. E
25 and F and incorporated herein by reference.

26 17. NAI has invested and continues to expend substantial funds to build,
27 expand and promote sales of CarnoSyn® beta-alanine. NAI pursues legal avenues to
28 protect its CarnoSyn® brand and intellectual property portfolio.

1 18. When NAI sells CarnoSyn® beta-alanine to customers, the customers
2 receive a scientifically-tested recognized product, a license to NAI's trademarks, and
3 patents, and are indemnified against product liability. The license extends only to the
4 CarnoSyn® beta-alanine purchased from NAI, and does not extend to CarnoSyn®
5 beta-alanine that contains or is mixed or comingled with any non-trademarked beta-
6 alanine. The customers do not, however, receive any authorization or license to use
7 NAI's copyrights.

8 19. By statute, NAI's U.S. patents are presumed valid. 35 U.S.C. § 282.
9 None of those patents have been held invalid by a court prior to this Court's
10 interlocutory June 26, 2017 Order.

11 20. NAI is the owner of U.S. Patent No. 5,965,596 ("the '596 patent"), issued
12 on or about October 12, 1999, entitled "Methods and compositions for increasing the
13 anaerobic working in tissues." A copy of the '596 patent is attached as Ex. G and
14 incorporated by reference.

15 21. NAI is the owner of U.S. Patent No. 7,504,376, issued on or about March
16 17, 2009, entitled "Methods and compositions for increasing the anaerobic working
17 capacity in tissues." A copy of the patent is attached as Ex. H and incorporated by
18 reference.

19 22. NAI is the owner of U.S. Patent No. 7,825,084 ("the '084 patent"), issued
20 on or about November 2, 2010, entitled "Methods and compositions for increasing the
21 anaerobic working capacity in tissues." A copy of the '084 patent is attached as Ex. I
22 and incorporated by reference.

23 23. NAI is the owner of U.S. Patent No. RE45,947 ("the '947 patent"),
24 issued on or about November 2, 2010, entitled "Methods and compositions for
25 increasing the anaerobic working capacity in tissues." A copy of the '947 patent is
26 attached as Ex. J and incorporated by reference.

27 24. Claim 1 of the '596 patent is directed to a method of regulating the
28 hydronium ion concentration in human tissue by providing an amount of beta-alanine

1 to the blood or blood plasma effective to increase beta-alanylhistidine dipeptide
 2 (carnosine) synthesis in the human tissue, exposing the human tissue to the blood or
 3 blood plasma and thereby increasing the carnosine in the human tissue.

4 25. Claim 1 of the '084 patent is directed to a human dietary supplement
 5 comprising beta-alanine in a unit dosage of between 0.4 grams to 16 grams.

6 26. Claim 34 of the '947 patent is directed to a human dietary supplement for
 7 increasing human muscle tissue strength comprising a mixture of creatine, a
 8 carbohydrate and free amino acid beta-alanine that is not part of a dipeptide,
 9 polypeptide or an oligopeptide, wherein the human dietary supplement does not
 10 contain a free amino acid L-histidine, wherein the free amino acid beta-alanine is in an
 11 amount that is from 0.4 g to 16.0 g per daily dose, wherein the amount increases the
 12 muscle tissue strength in the human, and wherein the human dietary supplement is
 13 formulated for one or more doses per day for at least 14 days.

14 27. Claim 6 of the '376 patent is directed to a human dietary supplement
 15 comprising glycine; and a) an amino acid selected from the group consisting of a beta-
 16 alanine, an ester of a beta-alanine, and an amide of a beta-alanine, or b) a di-peptide
 17 selected from the group consisting of a beta-alanine di-peptide and a beta-
 18 alanylhistidine di-peptide.

19 **B. Defendants**

20 28. Allmax offers to sell and sells bodybuilding and sports nutrition
 21 supplements in the United States, Canada and across the world. Some of these
 22 supplements contain beta-alanine. Defendants maintain and operate a website at
 23 www.allmaxnutrition.com, the content of which is incorporated herein by reference, to
 24 promote the sale of products.

25 29. HBS is the exclusive distributor of Allmax branded products in the
 26 United States, including supplement products containing beta-alanine.

27 30. Allmax and HBS collectively have represented to courts in other cases
 28 that:

[Allmax and HBS] are pioneers in the nutritional supplement industry. Established on the principle that nutritional supplement products should be grounded in science, innovation, quality and results, [Defendants] manufacture, market and sell the Allmax Nutrition branded line of nutritional supplements. Every Allmax Nutrition supplement embodies [Defendants'] dedication to this core value, creating a revolutionary line of supplements that thousands of health-conscious consumers have come to know and trust.

Ex. K, ¶ 8 (Complaint in *Allmax Nutrition Inc. and HBS Int'l Corp. v. Bioexx Specialty Proteins Ltd.*, No. 11-CV-449 (D. Me.) (incorporated herein by reference)); see also Ex. L, ¶¶ 8-20 (Complaint in *Allmax Nutrition Inc. and HBS Int'l Corp. v. Rivalus, Inc.* No. 2:13-cv-379 (D. Me.) (incorporated herein by reference)).

31. Allmax also represents to the public that it creates, offers for sale and supplies dietary supplements. For example, in its Fall 2015 catalog, Allmax represents that:

WHY ALLMAX?

Rigorous research standards yield powerful results

This has resulted in a line of products that has gained the trust of thousands of dedicated professional athletes, amateur athletes, coaches, trainers and those who have chosen to make high quality nutrition a part of their life.

WE BELIEVE in dedicating ourselves to strict policies of quality in manufacturing. We maintain the absolute highest grade of manufacturing for all our products – NSF certified, cGMP compliant and government-inspected facilities featuring state-of-the-art conditions with sealed air-pressurized chambers.

1 **A healthy obsession with purity, potency and effective formulas**

2 WE ARE OBSESSIVE about testing and analyzing each and every batch
3 of our product. We go well beyond the call of duty to ensure that what
4 we put on the label is precisely what is in the product and in the required
5 amounts and concentrations. We employ independent, 3rd party
6 laboratories to rigorously test every product to ensure 100% validity,
7 potency and safety. If even one of these strict standards is not met, the
8 product is rejected and never makes it past this stage. There are cheaper
9 and easier ways to create the supplements you consume, but we do not
10 believe in anything less, nor will we settle for it.

11
12 **High quality products provide the best results**

13 OUR CUSTOMERS have had a healthy obsession with our products for
14 more than a decade because they get results. They understand the
15 importance of following a solid diet and training hard in combination
16 with our high quality products. We understand that our customers
17 demand more, which is why we consistently supply cutting-edge
18 supplements to help them achieve their goals as quickly and effectively
19 as possible.

20
21 **The ALLMAX Nutrition® brand stands for Science, Innovation,**
22 **Quality and Results**

23 We continue to quietly grow through word-of-mouth recommendation,
24 as satisfied athletes and trainers continue to tell others about their
25 impressive results.

26 Ex. M at 2.

27 32. The products at issue are offered to and may be purchased and used by
28 citizens of California.

1 33. Defendants sell and/or offer to sell Razor 8 Blast Powder, which contains
2 beta-alanine. Ex. M (Catalog page for Razor 8 Blast Powder).

3 34. Defendants represent that the Razor 8 Blast Powder is licensed under one
4 or more of U.S. Patent Nos. 5,965,596 and 6,426,361, each of which is owned by
5 NAI. *Id.*

6 35. Defendants also acknowledge that NAI is the owner of the trademark
7 CarnoSyn®. *Id.*

8 36. Defendants' website for the Razor 8 Blast Powder product states that it
9 contains 425mg of CarnoSyn® beta-alanine. Ex. N (Razor 8 webpage).

10 37. Defendants' website for the Razor 8 Blast Powder product has a link to
11 "Science," which directs the viewer to another page. This other page describes the
12 benefits of taking beta-alanine and also uses NAI's trademark and copyrights. Ex. O
13 (Razor 8 science).

14 38. Defendants sell and/or offer to sell C-VOL (CREMAGNAVOL®), which
15 contains beta-alanine. Ex. M (Catalog page for C-VOL and CREMAGNAVOL®).

16 39. The C-VOL product also contains creatine and carbohydrate. *Id.*

17 40. The C-VOL product does not contain L-histidine. *Id.*

18 41. Defendants represent that the CREMAGNAVOL® product is licensed
19 under one or more of U.S. Patent Nos. 5,965,596 and 6,426,361, each of which is
20 owned by NAI. *Id.*

21 42. Defendants also acknowledge that NAI is the owner of the trademark
22 CarnoSyn®. *Id.*

23 43. Defendants' website for the C-VOL product states that it contains
24 800mg of CarnoSyn® beta-alanine. Ex. P (C-VOL webpage).

25 44. Defendants sell and/or offer to sell Vitastack, which contains beta-
26 alanine. Ex. M (Catalog page for Vitastack).

27 45. The Vitastack product also contains glycine. *Id.*
28

1 46. Defendants sell and/or offer to sell MUSCLEPRIME®, which contains
2 beta-alanine. Ex. M (Catalog page for Muscleprime).

3 47. Defendants represent that the MUSCLEPRIME® product is licensed
4 under one or more of U.S. Patent Nos. 5,965,596 and 6,426,361, each of which is
5 owned by NAI. *Id.*

6 48. Defendants also acknowledge that NAI is the owner of the trademark
7 CarnoSyn®. *Id.*

8 49. Defendants state that the “Patented CarnoSyn® Beta-Alanine in
9 MUSCLEPRIME® promotes greater concentrations of muscle Carnosine resulting in
10 increases in STRENGTH, POWER and MUSCLE MASS.” Ex. M (Catalog at page
11 26).

12 50. Defendants also state that beta-alanine has been shown to increase
13 anaerobic endurance and delay the onset of fatigue, “letting you train with greater
14 intensity and duration.” *Id.*

15 51. Defendants’ website for MUSCLEPRIME® states the product contains
16 0.6g of CarnoSyn® beta-alanine. Ex. Q (Muscleprime website).

17 52. Defendants’ website for the MUSCLEPRIME® product has a link to
18 “key factors,” which directs the user to another page. This other page describes the
19 benefits of taking beta-alanine and also uses NAI’s trademark and copyrights. Ex. R
20 (Muscleprime key factors).

21 53. Defendants sell and/or offer to sell beta-alanine. Ex. M (Catalog at page
22 34).

23 54. Defendants’ website for beta-alanine uses NAI’s trademark and
24 copyrights. Ex. S (beta-alanine webpage).

25 55. Defendants’ website for beta-alanine has a link to “carnosyn,” which
26 directs the user to another page. This other page describes the benefits of taking beta-
27 alanine and also uses NAI’s trademark and copyrights. Ex. T (beta-alanine carnosyn).
28

1 56. Defendants' website for beta-alanine has a link to "science," which
2 directs the user to another page. This other page describes the benefits of taking beta-
3 alanine and also uses NAI's trademark and copyrights. Ex. T (beta-alanine science).

4 **C. Defendants Use Of Beta-Alanine**

5 57. Defendants have never directly purchased genuine CarnoSyn® beta-
6 alanine from NAI or CSI for use as an ingredient in the accused products.

7 58. Defendants, through certain contract manufacturers acting on their
8 behalf, purchased some genuine CarnoSyn® beta-alanine from NAI or CSI for use as
9 an ingredient in the accused products.

10 59. Defendants, through certain contract manufacturers acting on their
11 behalf, purchased non-CarnoSyn® beta-alanine from entities other than NAI or CSI
12 for use as an ingredient in the accused products. According to their Initial
13 Disclosures, a true and correct copy of which is attached as Ex. V and incorporated by
14 reference, three of those contract manufacturers, NutraMed, Inc., Ruspak Corp., and
15 Millhaven do not have license agreements with NAI and have not purchased licensed
16 CarnoSyn® from NAI or CSI. As such, the accused products made by those
17 manufacturers do not contain genuine CarnoSyn® beta-alanine that is not comingled
18 or mixed with non-CarnoSyn® beta-alanine.

19 60. Further, Defendants' other contract manufacturers named in the Initial
20 Disclosures have entered into CarnoSyn® license agreements with NAI. However,
21 contract manufacturers, by definition, make dietary supplement products for a number
22 of different brand companies. A contract manufacturer could buy licensed
23 CarnoSyn® beta-alanine from NAI for use in one branded company's product and buy
24 non-CarnoSyn® beta-alanine from a different supplier for use in other company's
25 products. With the exception of Arnet Pharmaceutical and Capstone Nutrition,
26 Defendants' other contract manufacturers named in the Initial Disclosures have not
27 informed NAI that they are making products for Defendants or that they are buying
28 CarnoSyn® for use in Defendants' products.

61. Defendants and their contract manufacturers are required to maintain business records pertaining to, among other things, the source and manufacturing of dietary supplement products under the Dietary Supplement Health and Education Act of 1994, Pub. L. 103-417 (1994). They are also required to maintain records pursuant to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107-188, 116 Stat. 594 (2002). Thus, discovery from the Defendants and their contract manufacturers will provide greater factual detail as to the extent of Defendants' use of non-CarnoSyn® beta-alanine in the accused products.

62. Defendants have made, offered for sale, and sold accused products that (a) do not contain 100 percent genuine CarnoSyn® beta-alanine, and/or (b) contain CarnoSyn® beta-alanine that is comingled or mixed with non-CarnoSyn® beta-alanine.

63. Defendants' improper use of the CarnoSyn® trademark as alleged above in connection with the accused products that either do not wholly contain genuine CarnoSyn® beta-alanine or contain a mixture of CarnoSyn® and non-CarnoSyn® beta-alanine is likely to cause consumer confusion, mistake, and deception and constitutes federal and common law trademark infringement. CarnoSyn® is a recognized brand name, supported by scientific research and known for its quality. *See generally* <http://www.carnosyn.com>. Defendants have advertised its Beta-Alanine product based on "The CarnoSyn Advantage." Ex. T. Defendants quote the named inventor on the patents covering CarnoSyn®, Dr. Harris, as saying: "The patented use of beta-alanine has resulted in a significant advantage in muscle performance technology. CarnoSyn beta-alanine has been proven effective in over 20 scientific studies, 15 of which have been published in peer reviewed journals." *Id.* Defendants also promote that CarnoSyn is covered by: "12 global patents. Over 20 clinical studies. 80% increase in muscle carnosine levels. 4.3 times faster peak rowing speeds. More than 16% increase in physical working capacity. Zero banned substances." *Id.*

64. The ability to purchase genuine CarnoSyn® is important to customers. For example, Nutrabolt, a market leader in sports nutrition products recently announced it entered into an extended license agreement with NAI. *See* Ex. W (June 26, 2017 news release), incorporated here by reference. The release wrote that “Nutrabolt is proud to include the patented, trademarked, and clinically studied CarnoSyn® beta-alanine in several of its products, including its award winning C4® brand of pre-workout products.” *Id.* It went on to emphasize that: “As the only clinically studied form of beta-alanine, CarnoSyn® beta-alanine has been shown to provide numerous performance enhancing benefits including an increase in muscular endurance, making it the perfect addition to a pre-workout product engineered to improve performance. Nutrabolt is proud to display the CarnoSyn® logo on its C4® and other product labels and to continue to conduct University based clinical studies on the performance enhancing benefits of its formulas containing CarnoSyn® beta-alanine. Nutrabolt is proud to partner with NAI, who has a long history of investing significant monies funding research and brand awareness related to beta-alanine around the world, as well as vigorously protecting its intellectual property rights against infringers, providing further value to its licensees.” *Id.* The use of the CarnoSyn® trademark on or about products that do not wholly consist of the genuine article is likely to cause confusion, mistake, or deception as to, among other things, the source, origin, and nature of the products.

D. Contacts With Allmax

65. On or about June 15, 2016, NAI’s counsel sent a letter to Allmax by overnight courier addressed to its President, Michael Kichuk (“Kichuck”). A copy of the letter is attached as Ex. U and is incorporated herein by reference. Among other things, the letter stated that Allmax does not purchase its beta-alanine product from NAI and therefore has no license rights to NAI’s patents or the CarnoSyn® trademark. The letter further demanded information from Allmax regarding its use of beta-alanine: “NAI requests that you provide answers to the following questions by June

1 22, 2016. Please provide the following information for the relevant products for the
2 past 24 months: (1) product sales; (2) identification of all manufacturers; (3) amount
3 of beta-alanine you have purchased; (4) identification of the supplier of all beta-
4 alanine; and (5) the cost of beta-alanine you have purchased.” Ex. U. To date,
5 Defendants did not provide such information to NAI.

6 66. On or about July 5, 2016, Kichuk contacted NAI to find out who to
7 discuss the issues raised in the cease and desist letter with at NAI. He was told to
8 speak to Kenneth Wolf, NAI’s President.

9 67. NAI also learned that contract manufacturers Arnet and Capstone had
10 been manufacturing products containing beta-alanine for Allmax for some time.

11 68. NAI filed its complaint for trademark, copyright and patent infringement
12 and provided Allmax with a courtesy copy. Allmax’s counsel sent an email to NAI’s
13 counsel on or about July 12, 2016, writing, in pertinent part:

14 Thank you for providing a courtesy copy of the complaint against
15 Allmax Nutrition Inc. I have also obtained the extensive exhibits
16 referenced in the complaint and have passed the material along to my
17 client with your inquiry regarding exploring a pre-service resolution.
18 My client’s initial response is that it is interested in exploring a
19 resolution to this matter pre-service, but it obviously needs some time to
20 review the complaint and associated exhibits to understand the basis for
21 NAI’s allegations.

22 69. Counsel for NAI and Allmax later had a telephone discussion in which
23 NAI requested information from Allmax on its products and use of beta-alanine. On
24 or about August 11, 2016, Allmax’s counsel left a voice message for NAI’s counsel
25 saying, in pertinent part:

26 This is Sean Sweeney and I am calling regarding NAI and Allmax
27 Nutrition. I wanted to follow up after our phone conversation. I finally
28 had a chance to touch base with my contact just now. First of all they

1 don't have the documentation or the bulk of the documentation that
2 you're looking for at this point and one of the things that is becoming a
3 significant problem for them is that NAI has apparently scared most of
4 the copackers to the point where they are not really willing to provide a
5 lot of information and so I'm not sure how my client is going to get
6 around that.

7 At no time during any of these communications did Allmax or its representatives
8 suggest that: (1) Defendants were not engaged in promoting, offering to sell and
9 selling dietary supplements, including the products at issue here, that contained non-
10 CarnoSyn® non-CarnoSyn® beta-alanine; (2) Defendants and/or their contract
11 manufacturers had any license agreement with NAI; or (3) that Defendants and/or
12 their contract manufacturers purchased CarnoSyn® beta-alanine from CSI or NAI.

13 70. Defendants first suggested that they had license agreements with NAI in
14 a letter its litigation counsel sent to NAI's counsel on April 18, 2017. A copy of the
15 letter is attached as Ex. X and is incorporated herein by reference. The letter contends
16 that on November 3, 2014, CSI confirmed the existence of a CarnoSyn® license
17 agreement.

18 71. The letter also contends that on February 25, 2016, NAI wrote to
19 Defendants that NAI could not find a record of a license agreement between NAI and
20 Defendants. The letter further states that, acting on behalf of Defendants, Mark
21 Ragotte ("Ragotte") signed a CarnoSyn® license agreement and returned it to NAI.
22 In their motions to dismiss and for judgment on the pleadings, Defendants represented
23 to the Court that they were parties to 2014 and 2016 license agreements with NAI.

24 72. The 2016 document attached to Ex. X is signed by Ragotte as HBS'
25 Chief Operating Officer and dated June 7, 2016. The document does not contain a
26 signature on behalf of NAI.

27 73. The opening paragraph of NAI's license agreements all provide that they
28 are "made and entered into as of the last signature below (the 'Effective Date')...."

74. No representative of NAI signed a license agreement with Defendants in 2016. In fact, NAI's business records show that it did not execute any license agreement with Defendants and that "Allmax is an infringer." Ex. Y (June 10, 2016 emails, incorporated herein by reference). NAI has not subsequently executed a license with Defendants.

E. Defendants' Copyright Infringement

75. Defendants use the contents of NAI's website on its own website as alleged above. *See, e.g.*, Exs. O, R, S, T.

76. The contents of NAI's website is protected by copyright, including registered copyrights.

77. Defendants are not authorized to use NAI's copyright.

F. Defendants' Patent Infringement

78. Defendants sell sports nutrition supplements that contain beta-alanine as alleged above. *See* Exs. M-T (copy of material from website and catalog).

79. The Razor 8 Blast Powder product infringes at least claim 1 of the '084 patent because it contains between 0.4 and 16 grams of beta-alanine per unit dosage. Exs. M-O (Razor 8 Blast Powder catalog page and website).

80. The Razor 8 Blast Powder product infringes at least claim 34 of the '947 patent because it contains beta-alanine between 0.4 and 16 grams per daily dose, creatine and carbohydrate, does not contain L-histidine and is formulated for one or more doses per day for at least 14 days. Exs. M-O (Razor 8 Blast Powder catalog page and website).

81. The C-VOL product infringes at least claim 1 of the '084 patent because it contains between 0.4 and 16 grams of beta-alanine per unit dosage. Exs. M, P (C-VOL catalog page and website).

82. The C-VOL product infringes at least claim 34 of the '947 patent because it contains beta-alanine between 0.4 and 16 grams per daily dose, creatine and

1 carbohydrate, does not contain L-histidine and is formulated for one or more doses per
2 day for at least 14 days. Exs. M, P (C-VOL catalog page and website).

3 83. The Vitastack product infringes at least claim 1 of the '084 patent
4 because it contains between 0.4 and 16 grams of beta-alanine per unit dosage. Ex. M
5 (Vitastack catalog page).

6 84. The Vitastack product infringes at least claim 6 of the '376 patent
7 because it contains glycine and the amino acid beta-alanine. *Id.* (Vitastack catalog
8 page).

9 85. The MUSCLEPRIME® product infringes at least claim 1 of the '084
10 patent because it contains between 0.4 and 16 grams of beta-alanine per unit dosage.
11 Exs. M, Q (Muscleprime catalog page and website).

12 86. The beta-alanine product infringes at least claim 1 of the '084 patent
13 because it contains between 0.4 and 16 grams of beta-alanine per unit dosage. Exs.
14 M, R (beta-alanine catalog page and website).

15 87. Defendants make statements in association with the promotion of its
16 beta-alanine product that induce infringement of at least claim 1 of the '596 patent.
17 For example, Defendants state that "beta-alanine is clinically proven to increase
18 muscle carnosine for long periods, [and] increase muscle buffering capacity. . . ." Ex.
19 S. They also state that "Muscle carnosine is the major buffering agent, or neutralizer,
20 of hydronium ions that lead to muscle fatigue and failure. By increasing the amount
21 of carnosine in the muscle, CarnoSyn beta-alanine both increases an athlete's peak
22 performance and speeds muscle recovery." Ex. T (beta-alanine webpage Science).

23 **COUNT I**

24 **(Lanham Act § 32)**

25 88. The foregoing allegations are incorporated by reference.

26 89. Defendants' products are used, sold, and/or offered for sale in interstate
27 and foreign commerce.

28 90. NAI owns the registered trademarks, a fact Defendants have not disputed.

1 which are (a) likely to cause confusion, or to cause mistake, or to deceive as to the
2 affiliation, connection, or association of them with NAI, or as to the origin,
3 sponsorship, or approval of its goods, services, or commercial activities by another
4 person, and/or (b) in commercial advertising or promotion (including without
5 limitation its website, promotional materials, emails and in trade publications), and
6 Defendants misrepresent the nature, characteristics, qualities, or geographic origin of
7 its or NAI's goods, services, or commercial activities.

8 102. Defendants knowingly and willfully misrepresented to the public, *inter*
9 *alia*, the facts alleged above.

10 103. Defendants' commercial messages and statements are either literally false
11 or literally true but ambiguous and have the tendency to deceive the market, the
12 public, consumers, potential consumers and competitors of NAI.

13 104. The misrepresentations were material and made in bad faith for the
14 purpose of deceiving the market, the public, consumers, potential consumers and
15 competitors of NAI and harming its competition, including plaintiff.

16 105. The misrepresentations deceive or are likely to deceive the market, the
17 public, consumers, potential consumers and competitors. Further, the
18 misrepresentations are likely to influence the purchasing decisions of others and have
19 caused injury or are likely to do so.

20 106. Defendants are jointly and severally liable for trademark infringement.

21 107. By reason of Defendants' statements and conduct, they have willfully
22 violated section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and NAI has suffered,
23 and will continue to suffer damage to its business, reputation, and good will and has
24 lost sales and profits that it would have made but for Defendants' acts.

25 108. NAI has been irreparably harmed by Defendants' acts in violation of the
26 Lanham Act and has suffered damages in an amount to be determined at trial.

COUNT III

(Common Law Trademark Infringement)

109. The foregoing allegations are incorporated by reference.

110. Defendants' products are used, sold, and/or offered for sale in interstate and foreign commerce.

111. NAI owns common trademarks as alleged above.

112. In connection with its goods or services that do not contain genuine and licensed beta-alanine purchased from CSI or NAI Defendants have used a reproduction, counterfeit, copy, or colorable imitation of one or more of NAI's common law trademarks without NAI's authorization or consent.

113. Defendants knowingly and willfully misrepresented to the public, *inter alia*, the facts alleged above.

114. Defendants used NAI's common law trademarks without NAI's consent or license as alleged above, knowing that such act is intended to be used to cause confusion, or to cause mistake, or to deceive.

115. Defendants' infringing use of the trademarks is likely to cause confusion, or to cause mistake, or to deceive.

116. Defendants are jointly and severally liable for trademark infringement.

117. By reason of Defendants statements and conduct, they have willfully infringed the trademarks and NAI has suffered, and will continue to suffer damage to its business, reputation, and good will and has lost sales and profits that it would have made but for Defendants' acts.

118. NAI has been irreparably harmed by Defendants' acts of trademark infringement and has suffered damages in an amount to be determined at trial in excess of \$75,000, exclusive of interest and costs.

COUNT IV

(Copyright Infringement)

119. The foregoing allegations are incorporated by reference.

1 120. NAI's work is an original literary, design and pictorial work of
2 authorship pursuant to 17 U.S.C. § 102(a). The copyrights in NAI's work are valid.

3 121. Defendants had access to NAI's work.

4 122. Defendants copied and distributed and used without authorization or
5 permission NAI's work, including on exhibits attached hereto.

6 123. Defendants willfully violated, and continues to willfully violate, NAI's
7 exclusive right to its protected copyright works in violation of 17 U.S.C. § 501.

8 124. Defendants profited from its infringement of NAI's copyrights.

9 125. NAI has been irreparably harmed by Defendants acts of infringement and
10 has suffered damages in an amount to be determined at trial.

11 **COUNT V**

12 **(Patent Infringement)²**

13 126. The foregoing allegations are incorporated by reference.

14 127. Defendants have made, used, sold, and/or offered for sale products
15 embodying the patented invention, thereby infringing, literally or under the doctrine of
16 equivalents, one or more claims of the '084 patent, '376 patent and the '947 patent
17 and will continue to do so unless enjoined therefrom.

18 128. Defendants have, through the sale of its products and promotion of such
19 products, including instructions for the use thereof, induced others (*i.e.*, the end users
20 of its accused products) to infringe literally or under the doctrine of equivalents, one
21 or more claims of the '596 patent.

22 129. Defendants' infringement has been willful.

23 130. NAI has been irreparably harmed by Defendants' acts of infringement
24 and has suffered damages in an amount to be determined at trial.

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² See footnote 1, *supra*.

COUNT VI

(Civil Conspiracy)

131. The foregoing allegations are incorporated by reference.

132. At all relevant times, Allmax, HBS, one or more of its contract manufacturers (including NutraMed, Inc., Ruspak Corp., and Millhaven) and DOES defendants have acted in concert, agreed, combined and conspired for an unlawful purpose or for a lawful purpose by unlawful means, *i.e.*, to have made, sell and offer for sale products containing beta-alanine not purchased from NAI that infringe NAI's CarnoSyn® trademark.

133. Defendants have committed one or more overt tortious or illegal acts of trademark infringement in furtherance of their conspiracy, as alleged herein.

134. An overt act by one member of the conspiracy is chargeable to all members.

135. Defendants' agreement and overt acts were done intentionally and with malice.

136. NAI did not authorize Defendants to use its registered or common law trademark rights for products that did not contain CarnoSyn® beta-alanine and which were made from beta-alanine purchased from a source other than NAI or CSI.

137. As a result of its civil conspiracy, Defendants are jointly and severally liable for trademark infringement.

138. As a direct and proximate result of the civil conspiracy, NAI has been injured by Defendants in an amount to be proven at trial in excess of \$75,000, exclusive of interests and costs.

REQUEST FOR RELIEF

NAI respectfully requests that this Court enter judgment against Defendants and that the following relief be granted:

- a. judgment that Defendants have violated sections 32 and 43(a) of the Lanham Act;

- b. treble damages and statutory damages;
- c. a preliminary and permanent injunction against continued violations of the Lanham Act;
- d. punitive damages allowed by law;
- e. attorneys' fees as allowed by law, including without limitation, 15 U.S.C. § 1117(a);
- f. judgment that Defendants have infringed NAI's common law trademark rights;
- g. judgment that Defendants have violated 17 U.S.C. § 501;
- h. statutory damages pursuant to 17 U.S.C. § 504;
- i. reasonable costs and attorneys' fees pursuant to 17 U.S.C. § 505
- j. a preliminary and permanent injunction against continued violations of NAI's copyrights;
- k. judgment that Defendants have infringed one or more claims of the '596, '084, '376 and '947 patents;
- l. judgment that Defendants' infringement of one or more claims of the '596, '084, '376 and '947 patents was willful;
- m. injunction against continued infringement (35 U.S.C. § 283);
- n. damages for past infringement (35 U.S.C. § 284);
- o. imposition of a constructive trust on all proceeds from the sale of accused products;
- p. increased and trebled damages for willful infringement (35 U.S.C. § 284);
- q. judgment for civil conspiracy in an amount to be determined at trial in excess of \$75,000.
- r. costs pursuant to Fed. R. Civ. P. 54(d) or otherwise provided by law; and
- s. such other relief as the Court deems just and appropriate under the circumstances.

JURY DEMAND

NAI hereby demands a jury trial on all issues so triable.

Dated: July 10, 2017

Respectfully submitted,

Wilson Turner Kosmo LLP

By: s/ Frederick W. Kosmo, Jr.
Wilson Turner Kosmo LLP

*Attorneys for Plaintiff Natural
Alternatives International, Inc.*